In the Supreme Court
OF THE
United States

OCTOBER TERM, 1960

No. 24

UNITED STATES OF AMERICA,
Petitioner,
vs.
E. B. HOUGHAM, OWEN DAILEY, WILLIAM E. SCHWARTZE and HARLAN L. MCFARLAND,
Respondents.

RESPONDENTS' BRIEF ON WRIT OF CERTIORARI

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Subject Index

Table of Authorities Cited

Cases

Statutes

Rules

Texts

Miscellaneous

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OPINIONS BELOW

Opinions below are correctly stated in Government's Brief.

JURISDICTION

Jurisdiction is correctly stated in Government's Brief.

QUESTIONS PRESENTED

1. Respondents challenge the Government's contention that Question No. 1 suggested is properly before this Court upon the record.

2. Respondents contend that the Government has made its own election.

3. Respondents contend that the Government has waived the right to change its election.

4. Respondents contend that by accepting one form of relief afforded by the Act, the Government is precluded by the Act from pursuing other measures of damage.

STATUTES INVOLVED

Section 26 of the Surplus Property Act is stated in the Government's Brief.

28 U.S.C.A., Section 2462, states:

> "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon. June 25, 1948, c. 646, 62 Stat. 974."

U.S.C.A. Title 18, Sec. 2387, provides:

> "When the United States is at war the running of any statute of limitations applicable to any offense committed in connection with the dispos-

tion of any real or personal property of the United States . . . shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent Resolution of Congress."

Proclamation 2714 12-FR-1 states:

"... Now, Therefore, I, Harry S. Truman, President of the United States of America, do hereby proclaim the cessation of hostilities of World War II, effective twelve o'clock noon, December 31, 1946. ...

Harry S. Truman

By the President: James F. Byrnes
The Secretary of State"

STATEMENT

The original Complaint was filed as suggested by the Government, seeking damages against Respondents under the remedy of damages provided for by Section 26(b)(1) of the Surplus Property Act. (Tr. 32?) The Complaint alleged that the fraud consisted of statements made by the veterans to the effect that the property was purchased for personal use. Interrogatories developed the fact that no such statements were made, and a Motion for Summary Judgment and to dismiss the original Complaint was presented to the Court. (Tr. 49.) To meet this defect in proof, the Government presented a First Amended Complaint, which differed from the original Complaint in two vital particulars: (1) It changed the allegation of

fraud in representing that the articles were purchased for personal use only to a totally different allegation that the veterans represented themselves to be engaged in an enterprise in which they owned more than 50% of the capital or were entitled to more than 50% of the profit; and (2) It changed the prayer by withdrawing its claim of $2,000 per act and claimed in lieu thereof twice the consideration paid. (Tr. 25 to 43.) The motion to file this Complaint was not denied, as asserted in the Government's statement on page 5, but was voluntarily withdrawn by the Government and never presented to the Court for a ruling. In lieu thereof, on December 21, 1956, the Plaintiff moved under Rule 15A for permission to file a Second Amended Complaint, and in that motion Plaintiff "withdrew its motion to file First Amended Complaint". (Tr. 48.) Such motion was taken under submission by the Court, along with the Defendant's motions to dismiss and for summary judgment. On January 18, 1957, the Court made its written order granting the Plaintiff's motion to file the Second Amended Complaint and to withdraw the proposed First Amended Complaint. (Tr. 54-55.) The Second Amended Complaint contained the same allegation of fraud that was embodied in the First Amended Complaint, and contained the original prayer for relief, measuring its damages by Section 26(b)(1).

The pre-trial conference order does contain the statement made on page 5 of the Government's Brief, but such statement is an incorrect summation of the record, for, as above stated, the Government attorneys

made a substitute motion to file the Second Amended Complaint and coupled such motion with a voluntary withdrawal of the motion to file the First Amended Complaint, and the sole order made by the Court with respect to the motions to file amended complaints was the order made on January 18, 1957, which is quoted as follows:

> "The motion of the plaintiff to file the Second Amended Complaint and to withdraw the First Amended Complaint is granted. The defendants are granted twenty days from the date hereof in which to file their answer" (Tr. 54.)

The Government thereafter on January 31, 1957, pursuant to the Court's ruling on its motion, filed its Second Amended Complaint; the Defendants filed their answer to the Second Amended Complaint on March 6, 1957; and the Government did not make any subsequent motion to further amend its complaint.

The Pre-trial Conference Order does contain the statement referred to and quoted on page 5 of the Government's Brief. However, as hereinbefore explained, such statement is not a correct summation of the record because the Court never ruled on any request of the Government to file an Amended Complaint other than its motion to file the Second Amended Complaint, which was granted. Paragraph VIIB of the Pre-trial Conference Order was inserted in such order by the Plaintiff's attorneys.

Paragraph III of the Conclusions of Law likewise erroneously states that the Court had ruled, in considering the Plaintiff's motion to file its First

Amended Complaint, that because the Government had elected to proceed under the provisions of Section 26(b)(1) it had made an irrevocable election and could not thereafter elect to receive damages under the provisions of Section 26(b)(2) as prayed for in the First Amended Complaint. (Tr. 116.) The Court never made any such ruling because, as hereinbefore stated, the Government voluntarily withdrew its motion to file the First Amended Complaint and coupled such withdrawal with a motion to file the Second Amended Complaint, which was granted. The point was not raised at the trial and the Court had nothing before it at the time of the trial with respect to which to make a ruling thereon. The Findings of Fact, Conclusions of Law and Judgment were prepared by the Government attorneys at the request of the Court, and by way of an understatement, do not correctly summarize the record.[1]

The Government elected to proceed to trial on the Second Amended Complaint and never attempted by motion or otherwise to make a different election (other than by its motion to file the First Amended Complaint which was voluntarily withdrawn) until *after* Judgment, when the Government on appeal raised the point as a contention.

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[1]Hindsight is better than foresight. Though not apparent to Respondents at the time, it is now obvious that the Government, after waiving the point, changed its mind and decided to endeavor to lay a foundation to use this case and *United States v. Bernstein* as a means of getting expressions upon the point by different Circuit Courts, in order to get to this Court, on certiorari. There is no objection to this procedure so long as it is undertaken in a proper manner, which is not the case here.

After trial, both parties appealed (Tr. 21, 22); and while the appeals were pending the Government accepted notes from Defendants totalling $8,000 plus costs, accepted monies on account of the notes, before the Opinion of the Circuit Court was rendered, and the notes have since been completely retired. (Reply to Petition for a Writ of Certiorari, pages 11 to 14.)

SUMMARY OF ARGUMENT

Respondents contend:

1. The different measures of relief contained in the Statute are not necessarily alternative, but are for the purpose of affording a remedy for varied factual situations, and the measure of relief must be appropriate to the facts of the case.

2. The Government seeks a construction of the Statute inconsistent with the clear objectives of the Act, contrary to its spirit and purpose, and contrary to its express language.

3. The Government elected its form of remedy by filing its original Complaint, and re-elected by filing its Second Amended Complaint after the Court granted its motion to file the Second Amended Complaint and to withdraw its motion to file the proposed First Amended Complaint.

4. After the case was at issue, the Government could only change its form of relief by permission of Court upon a showing that no prejudice would result

and that the ends of justice would be furthered, which it failed to do.

5. By proceeding to judgment on the Second Amended Complaint, the Government waived any further right to change its form of remedy.

6. By accepting the notes and their payment, the Government has been awarded full relief in the form prescribed by the Statute.

7. The record of the proceedings before the trial court would not under any circumstances justify the supreme court in remanding the district court decision with instructions to enter judgment for damages under Section 26(b)(2) of the Surplus Property Act.

ARGUMENT

POINT 1: THE DIFFERENT MEASURES OF RELIEF CONTAINED IN THE STATUTE ARE NOT NECESSARILY ALTERNATIVE BUT ARE FOR THE PURPOSE OF AFFORDING A REMEDY FOR VARIED FACTUAL SITUATIONS, AND THE MEASURE OF RELIEF MUST BE APPROPRIATE TO THE FACTS OF THE CASE.

We discuss this point because we assume that the Court, in granting Certiorari, assumed that the question was properly before the Court. We do not admit this to be the fact and wish to make it clear that this discussion is in no way to be construed to be an admission that the question has been properly presented to this Court for review in this proceeding.

The contention of the Government that it has the unequivocable right to select one of three remedies

irrespective of the evidence, cannot be fairly supported by the language of the Act. The language of the Act, fairly read, requires that the remedy be appropriate to the occasion, and for this reason it provides for alternatives. In the event that the fraud involved was not monetary in nature, the appropriate remedy would be $2,000 for the act. If the fraud involved a contract where monies were agreed to be given in some stage of the transaction, such as in an executory contract or a price fixed by a bid, then the remedy appropriate to the occasion would be twice the consideration agreed to be given.[2]

Or if the property were available, the appropriate remedy could be the return of the property, in case it was under-priced by reason of the fraud or in case the defendant should be insolvent. Conceivably, situations could occur were more than one of the remedies would be considered appropriate. Unquestionably in such situations the Government should be entitled to

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[2]Senate Report No. 10057, 78th Congress, discusses Section 23A of the Act then before the Senate on pages 13 and 14 of the Report. It discusses the penalty and fraud provisions of the Act finally adopted in Section 26 of the Surplus Property Act. It uses this language: "The United States is given the option of electing among three *different* measures of damages."

On page 11 of the Report, the subject "conditional sales" is discussed, thus indicating that the Government contemplated that executory contracts would be extensively used in its disposal program, and which makes the second of the different measures of damages, "the United States may recover from such person twice the consideration which he agreed to give to it", an appropriate remedy to the occasion. Nowhere in the discussion is the word "alternative" remedy used.

Prices of surplus property are also extensively fixed by calling for bids, as in *Bernstein*, Tr. 237.

make the selection: it would normally be made at the time of the filing of the Complaint, but could be made subsequently by leave of Court upon a showing that the ends of justice required the amendment and that no prejudice would result.

In the instant case, the second alternative is not appropriate because of the nature of the transaction. The transaction here involved did not involve any contract or agreement wherein "monies were agreed to be given or a price fixed by a bid." Here, the Government has set its own price and been paid in full in spot cash transactions which never were executory and never involved monies agreed to be given. (Tr. 238, 239; Ex. 6, Ex. 4; Tr. 241.)

The statute itself makes this distinction in 26(b)(3), which allows the Government to "retain as liquidated damages any consideration given".

The Surplus Act provides for sales upon executory contracts in Sec. 8302.8, Sub. (d) of Regulations issued thereunder.

The Appellate Court followed this reasoning when it stated: "There was only one statutory remedy, as Defendants claim. The amount of recovery prayed for had no effect upon the substance of the claim. If a cause of action was stated, based upon the statute, the amount of the recovery would be based upon the proof"; and "If these words (if the United States shall so elect) mean that the Government is entitled to the particular form of relief it chooses, willy-nilly, regardless of the evidence, and that the Court can

award that form and no other, unquestionably the proviso constitutes a criminal penalty, and the Courts which have construed these clauses as providing liquidated damages are wrong"; and, "The Trial Court unquestionably believed that twice the consideration agreed to be paid was not applicable here".[3]

There is nothing new or startling in the Court's reasoning. It has always been the province of the Court to determine the character and breadth of the trick or device involved, in the light of reason, and the evidence.

U. S. v. Hess, 87 Law. Ed. 443;
U. S. v. Rohleacher, 157 Fed. Supp. 126;
U. S. v. Grannis, 172 Fed. 2d 507;
F. N. B. Birmingham v. U. S., 117 Fed. 486;
Rex T. Sadler v. U. S., 100 Law. Ed. 160;
U. S. v. Rubin, 243 Fed. 2d 900.

[3]The Government is, in effect, arguing that the Court should have no voice whatever in the selection of the remedy after the filing of the Complaint, or in the determination of the reasonableness of the damage, and is seeking a maximum monetary recovery regardless of the equities, and damages, or lack thereof, suffered by the Government.

It would regulate the Court at a surplus trial to the position of a mere chairman of the proceeding and strip it of all discretionary power. This approach is contrary to the spirit of the Act, which gives the Court "full power and jurisdiction to hear, try, and determine such suit", and it is contrary to the basic concept of liquidated damages which, as stated in *Rex Trailer Company v. United States,* 350 U.S. 148, must be reasonable:— "liquidated damages, when reasonable, are not to be regarded as penalties"; and, "On this record it cannot be said that the measure of recovery is so unreasonable or excessive that it transformed what was clearly intended as a civil remedy into a criminal penalty". The Court below noted this situation by stating, "if the Government is entitled to the particular form of relief it chooses, willy-nilly . . . unquestionably the proviso constitutes a criminal penalty".

And since the advent of the New Federal Rules, the prayer becomes unimportant and relief is measured by the evidence.

II Moore, Fed. Practice, § 8.14;
Nester v. Western Union Telegraph Co., 25 Fed. Supp. 478;
Gins v. Mauser Plumbing Co., 148 Fed. 2d 974;
U. S. v. Bernstein, 149 Fed. Supp. 568.

POINT 2: THE GOVERNMENT SEEKS A CONSTRUCTION OF THE STATUTE INCONSISTENT WITH ITS LANGUAGE, ITS OBJECTIVES, AND CONTRARY TO ITS SPIRIT AND PURPOSE.

50 Am. Jur. 365.

A construction that would make part of a statute superfluous is to be avoided. Each portion of the statute must be given a meaning.

50 Am. Jur. 363.

A construction is favored which will make every word operative rather than one which makes some words idle.

50 Am. Jur. 362.

Significance should be given to every *word* in a statute.

The Government ignores "agreed to be" and treats the statute as if it read "*monies paid*". Under the above quoted rule of construction, it may not do this. The Government also ignores the fact that the Act distinguishes between "agreed to be given" and "paid".

The Government does not seek an interpretation of the Act consistent with its objectives which appear in its legislative history and in its expressed intent.

50 Am. Jur., page 283, states:

> "The purpose for which a statute is enacted is of primary importance in the interpretation thereof. . . . In any event, in the interpretation of a statute of doubtful meaning, it is proper to take into consideration its purpose or object, or the aim, design, motive, or end in view, or the aspirations intended to be efficiently embodied in the enactment."

The principal object, aim or design of the Surplus Property Act is to provide an effective method of disposing of war surplus property. Incidental to this broad objective, it endeavors to accomplish that result in a manner that will aid veterans to re-establish themselves in civil life; and also incidental to the purpose, it endeavors to provide an orderly means of putting the surplus property into normal channels of trade consistent with the protection of free enterprise. The damage provisions of the Act are designed only to provide a means of affording reasonable compensation to the Government for the damage which it may sustain by reason of any fraudulent trick, scheme or device. The Act has penal provisions designed to discourage fraudulent practices.

The legislative history of the Act notes that the Sections are designed to give the Government different measures of damages appropriate to the occasion (Footnote 2, supra). The contention of the Govern-

ment goes far beyond the aims and objects of the Surplus Property Act as disclosed in the Act itself, and in the legislative history of the Act, and seeks a construction which has no reasonable relation to the ends and objects of the Act itself, but, instead, goes far beyond and affords the Government a maximum recovery in every case, even though such a construction ignores the distinction between "consideration agreed to be given" and "consideration given". It allows the Government to recover a sum which has no relation whatsoever to the damage, if any, sustained by the Government, and which is so severe that it would have a deterrent effect upon the whole surplus disposal program.

This is tantamount to using the Statute as a means of replenishing the Treasury, irrespective of any damage suffered, a purpose which was not set forth in the objectives provided in the Statute or in the legislative history or in the clear language of the Act itself.

50 Am. Jur., page 293, states:

> "It is also a general rule that a statute should not be extended by construction beyond the correction of the evils sought by it. . . ."

To allow an interpretation of the Act to provide alternative remedies, irrespective of the evidence, is to take from the Court its inherent right to require the facts to meet the occasion and to require the application of the laws to be reasonable. Under the theory advanced by the Government, a fraud very insignificant and not monetary in nature which would do no

damage of any significance to the Government could permeate a transaction involving huge expenditures and thus result in a triple recovery to the Government; a result which in no way could be said to be a recovery of compensatory or liquidated damages. It could constitute punishment more severe than criminal penalties—a result not within the spirit of the Act or the intent of the legislature.

The statute should be construed to avoid this possibility. 50 Am. Jur. 432.

The application of Section 26(b)(2) to the facts of this case would be so harsh and unreasonable as to constitute a penalty, which would distinguish the cases of *U. S. v. Doman* and *Koller v. U. S.*, and bring into play the statute of limitations, for the original Complaint was filed one day too late, and the Second Amended Complaint, being different in substance, was filed over a year too late.[4]

The argument that the express language of the Act gives the Government the option of electing from alternative rather than appropriate remedies is not bolstered by Senate Report 1142, 79th Congress, Second Session, which discusses "different" measures of damage, not "alternative" measures. So far as Con-

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[4]Opening Brief, Court of Appeals, pages 7 to 12. *Soloman v. U.S.* holds that 26(b)(2) is not penal, as applied to the facts of that case; but neither *Soloman*, *Koller* or *Doman* discuss the rule that under certain circumstances a measure would be fair and reasonable, and under other circumstances the same measure would be so harsh and unreasonable as to be "penal", irrespective of the language used.

gressional intent is expressed in the Report, it is more consistent with Respondents' view than with the Government's.

The argument that the policy of the War Surplus Act gives the Government the option of electing from alternative rather than appropriate remedies is likewise not convincing, for Respondents' construction of the Act is more consistent with the policy as expressed in the Surplus Property Act than the construction urged by the Government. The Government looks only to Section 26 and not to the whole Act to determine the policy. The underlying policy of the Surplus Property Act is to provide a ready means of disposing of surplus property. Section 26 is not the objective of the Act, but merely one part thereof, inserted to provide the Government a means of recovering reasonable damages which it may suffer by reason of the fraudulent acquisition of surplus property. Respondents' construction adequately protects the Government from sales to those to whom it would not be willing to sell and at prices it would not be willing to receive, or from having property channelled away from those otherwise entitled to a priority.

The Government's argument overlooks the fact that the principal purpose of the Surplus Act is thwarted rather than furthered by its requested construction because it goes beyond the province of reasonable damage which the Act is designed to afford the Government, and applies a measure so drastic as to discourage all purchasers of Government surplus property and thus defeat the basic objective of the Act.

It is further noted that many of the elements of the Government's policy argument in respect to the severeness of the damage and the difficulty of providing an adequate means of recovery were not in the law at the time the great majority of the transactions here involved took place.[5]

The fact that no litigant has in the preceding 15 years challenged the right of the United States to select among the statute's three remedies is neither helpful nor harmful. If anything, it would indicate that the Government, during that period, had made its election at the time of filing its Complaint and consistently abided by the election thereafter.

The question of when and how the election is to be made has never been discussed in any reported surplus case with the exception of *Bernstein v. U. S.*, 256 F. 2d 697 (C.A. 10). That case is distinguishable

[5]Senate Report, 1142, 79th Congress, Second Session, brings into sharp focus the fact that the original Act did not give the veteran a sufficiently high priority, and proposed that his preference be advanced from sixth position to one second only to the Federal Government. This Committee Report was dated March 5, 1946, and the transactions here involved occurred between March and July, 1946, only a few in September. The amendment considered in the Senate Report did not become law until May 3, 1946, and regulations thereunder restricting the right of the veteran to purchase for resale unless he owned 50% of the enterprise or was entitled to 50% of the profit, and regulations discouraging "brokering" were not enforced until November 6, 1946. 11 F.R. 10035, 11136. Tr. 426, 427.

This distinguishes the argument of the Government and the effectiveness of *Bernstein* as a parallel to this case, for Bernstein involved the amended Act and regulations. The instant case involved the original regulations under which the veteran had a low priority. The sales to the general public of the surplus equipment here involved were advertised in the same catalogue and at the same prices, subject only to a limited period of bidding preference to the veteran. Tr. 241-245.

from the case at bar in several vital particulars, in addition to that discussed in Footnote 5. There, the Government initially filed, measuring its damages under the provisions of Section 26(b)(2) of the Surplus Act. Five years later, it sought to amend its Complaint through proper procedure to change its remedy from 26(b)(2) to the common law remedy of recovering the proceeds of the sale of the property (not the recovery of the property, authorized by 26(b)(3)); and defendants answered, claiming an election of remedy was made at the time of filing the Complaint. The trial court, stating that the ends of justice would not be served and that prejudice resulted from the change in the remedy, upheld the defense of election and denied the Government the right to trace the proceeds.

The appellate court reversed the trial court, stating that it disagreed with the Court's finding that prejudice would result or that the ends of justice would not be served, by allowing the alternative procedure of common law by recovering the proceeds of the sale of the property.

The case is not authority for the proposition that the Court has nothing to do with the election of remedies, or the proposition that the right to elect is in the Government exclusively.

The question of the right to elect in *Bernstein* was properly presented to the trial court in the first instance, which is not the case here. Furthermore, the discussion in *Bernstein* in regard to the doctrine of "election of remedies" related to the common law

doctrine which required a litigant, after choosing one of two inconsistent positions, to forego the other. The question of election of remedies, insofar as this case is concerned, has nothing whatsoever to do with the common law doctrine of election of remedies, but has to do with the interpretation of the War Surplus Act, which is a problem of construction and which has no bearing or relationship to the common law doctrine of election of remedies.

Bernstein is further vastly different from the instant case upon the facts, for there huge profits were involved, flowing apparently from the fact that the sale was underpriced in the first instance. The sale price was fixed on the basis of Bernstein's bids in the first instance. Here, the sale price was fixed by the Government and there was no contention that any speculative profit resulted.

Respondents have never contended that Section 26(b)(2) is limited to unexecuted transactions, but do contend that it applies only to transactions in which, at some point, a fraudulent scheme involved monies "agreed to be paid".

The facts of *Bernstein* do show that, in the preliminary negotiations, Bernstein made an offer or bid, and it was on this basis that the price was fixed to the Veterans. Moneys were therefore agreed to be paid.

Soloman v. United States, 276 F. 2d 669, involved an arrangement whereby the contract was at one stage executory. The Opinion states, "The Solomans paid to each veteran the amount of money which the veteran had agreed to pay for the steel".

Neither "Soloman" nor "Bernstein" discussed the problem of whether Section 26(b)(2) was applicable to the facts of the case; both decisions, without comment, assumed that the statute was applicable.

The policy of the War Surplus Act, namely, to prevent fraud, to make the Government whole and to carry out its surplus disposal program in an orderly manner, is furthered by Respondents' construction more effectively than by the Government's, for it is submitted that justice is better accomplished by applying a remedy appropriate to the facts of the case, rather than to allow a remedy having no relation to the specific transaction in question to be arbitrarily chosen by the Government without any Court supervision over the reasonableness of the case.[6]

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[6]The hearings before the Sub-Committee of the Committee on Appropriations, United States Senate on H.R. 7454, page 920, discusses not only the magnitude of the Government's "Surplus problem", but the reasons for keeping it liquid, practical and operating. The reasons for the disposal problem were given:

1. Day-to-day operations caused military equipment to wear out.
2. Obsolescence takes great inroads on military hardware.
3. When equipment is replaced by a new and more effective product, the parts problem of the old article also becomes surplus whether new or used.
4. Retention of these articles results not only in a loss of their inherent value, but also creates storage, warehouse, accounting and bookkeeping problems.

The magnitude of the surplus problem, 8 to 10 billion a year in volume, as discussed by Mr. Riley, Director of Surplus Management Policy, indicates that unreasonably harsh penalties should not be inflicted to the extent that they will be an effective deterrent to dealing in surplus property by the general public.

POINT 3: THE GOVERNMENT ELECTED ITS FORM OF REMEDY BY FILING ITS ORIGINAL COMPLAINT, AND RE-ELECTED BY FILING ITS SECOND AMENDED COMPLAINT AFTER THE COURT GRANTED ITS MOTION TO FILE THE SECOND AMENDED COMPLAINT AND TO WITHDRAW ITS MOTION TO FILE THE PROPOSED FIRST AMENDED COMPLAINT.

The Government's contention is that the right to make the election rests in the executive branch of the Government and not in the trial court. We do not dispute the Government's right in this regard. We admit that in the first instance the power and right to make the election of which of the three remedies is to be used lies in the Government to the extent that the evidence upon which it relies to establish its case makes the remedy appropriate.

The right and power of the Government to make the election is not unlike the right and power of any plaintiff in any case to make an election. The first election is whether or not to litigate. This involves a decision as to (a) whether a wrong has been committed for which there is legal redress; (b) whether there is evidence to prove that alleged cause of action; and (c) if the evidence will support alternative relief, the type of relief desired. Once these matters have been decided upon, the first step in the litigation is to prepare and file a complaint. It is at this point that the election of remedy is made in almost all types of litigation. When the Complaint is filed and the election is made, it is made in the manner most appropriate to the facts making the cause of action.

Thereafter, in any case, a litigant is privileged to change his election only after permission of the Court

having been first had and obtained upon a showing that the ends of justice require the amendment and that prejudice will not result thereby. *U. S. v. Oregon Lumber,* 260 U.S. 290, 67 Law. Ed. 261, 43 Supreme Court 100. *Minneapolis Nat'l Bank of Minneapolis, Kansas v. Liberty Nat'l Bank of Kansas City,* 72 Fed. 2d 434; *Herrin Motor Lines v. Jarvis,* C.C.A. Miss. 1946, 156 F. 2d 276; *Wittmayer v. U. S.,* C.C.A. Mont. 1941, 118 F. 2d 808; *U. S. v. A. H. Fischer Lumber Co.,* C.C.A.S.C. 1947, 162 F. 2d 872; F.R.C.P. 15(a).

The language of the Surplus Act affirmatively requires the Government to make an election if it seeks damages in a form other than $2,000 per act. It does not authorize the Government to capriciously change its mind or to await the outcome of the proceeding for the purpose of determining which course to select. The Act says "elect"; not "elect twice"; not "reserve the right to elect".

Neither does the Act give to the Government, to the exclusion of the Courts, the unrestricted and unbridled arbitrary right to make the election at a time or in a manner of its choosing, for Section 26(c) of the Act provides: "The several District Courts of the United States . . . within whose jurisdictional limits the person or persons . . . resides or shall be found, shall have full power and jurisdiction to hear, try, and determine such suit". Conceding that the United States, at the outset, had the power to select the form of remedy which would be supported by the evidence at its command, there is no reason arising out of the language of the War Surplus Act, or otherwise, why the Gov-

ernment should not be subject to the usual rules of procedure applied by the Courts to all litigants, which would restrict, the right of the Government to change its form of remedy after filing its Complaint to the extent that permission of the Court be had and obtained after a showing that no prejudice would result and that the ends of justice would be furthered by permitting the amendment. The Government made an election when it filed its original Complaint and thereafter made a re-election to recover the damages provided for in Section 26(b)(1) of the Surplus Property Act when it filed its Second Amended Complaint pursuant to the Order of the Court granting the motion to file such Complaint and to withdraw the motion to file the First Amended Complaint. The Government never thereafter sought to make any further election.

These respondents will suffer great prejudice if, after trying the case under one theory, the Government, after trial, is allowed to change its form of remedy from $2,000 per act to twice the consideration paid. They tried this case on the theory that $2,000 per act was the measure of damage selected, and certainly would not have waived a jury or foundation to the purchase invoices had twice the consideration paid been the object of the trial, or an alternative remedy that the Government could later select.

Three of the four applications were applied for before the amendment of the Surplus Act in 1946. Also, most of the transactions (about 80%, dollar-wise) took place before the amendment of the Act, and all transactions occurred before the regulations were changed re "brokering", and these distinctions would have to be made before the 26(b)(2) formula could be applied, if at all.

The Court evidently was of the opinion that the ends of justice would not be furthered by allowing the harsh remedy of 26(b)(2) in view of the facts of this case. Tr. 440, 441, 442, 443. Although we argued unsuccessfully that the Court's finding of fraud was clearly erroneous, the evidence produced indicated

POINT 4: AFTER THE CASE WAS AT ISSUE, THE GOVERNMENT COULD ONLY CHANGE ITS FORM OF RELIEF BY PERMISSION OF COURT UPON A SHOWING THAT NO PREJUDICE WOULD RESULT AND THAT THE ENDS OF JUSTICE WOULD BE FURTHERED, WHICH IT FAILED TO DO.

The record shows that the Government voluntarily abandoned its attempt to change its election of remedy, and for this reason the question certified to this Court for further attention is not presented in the record. The attempt to change the form of remedy from that provided in Section 26(b)(1), to 26(b)(2) was presented to the Court by a Motion (Tr. 24) to permit the filing of a First Amended Complaint. (Tr. 25 to 43.) Before this Motion was ruled upon, the Government voluntarily withdrew the First Amended Complaint, abandoned the Motion to file the same, and offered for

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that the fraud, if any, in these transactions was not severe and that no monetary damage resulted to the Government by reason of the transactions. First, the transactions never involved monies "agreed to be paid". Second, the Applications were signed at a time when the policy of the Government had not been sufficiently formulated to advise the defendants of the fact that their activity was wrongful. Three of the four applications were signed before the Surplus Act was amended to give the veteran a third priority, and all transactions were completed before the Government tightened its policy in regard to brokering. These were not transactions in which the veterans were picked out of thin air and used as a "tool". In one form or another, Hougham actively assisted these veterans in returning to peacetime activity, which was one of the major objectives of the Surplus Act. There was no monetary fraud involved, because the Government set its own price and received full payment in cash. There had been no previous criminal prosecution, such as had been the case in *Rex Trailer, Donas, Marcus v. Hess*, and *Rubin*.

Undoubtedly these considerations were in the mind of the trial court at the time it selected the base for imposing forfeiture which was most appropriate to the occasion. The selection, however, was not made on the basis that it was the selection less "favorable" to the Government.

filing a Second Amended Complaint which prayed for relief under Section 26(b)(1), and the Second Motion was granted. (Tr. 54 and 73.)

This action on the part of the Government was the outcome of argument upon the Motion for a Summary Judgment, wherein it was pointed out that the evidence which had been developed by interrogatories failed to support the allegation of the first Complaint to the effect that articles were purchased for personal use. The First Amended Complaint was then offered, and the objection was raised that the evidence also failed to support the cause of action which it attempted to allege, namely, a recovery of twice the consideration agreed to be paid, for the interrogatories also developed that in no part of any transaction was there any agreement to pay any sum at any time. All of the transactions were cash sales. The result was the Motion to withdraw the First Amended Complaint and to file the Second Amended Complaint, which cured the objectionable allegation of fraud in the first Complaint and the objectionable prayer for recovery contained in the First Amended Complaint, and the Motion was granted.

This occurred January 18, 1957. The Pre-Trial Order was not entered until September 3, 1957. (Tr. 105.) No attempt or request was made at the Pre-Trial hearing for permission to amend the pleading, which would have been proper under pre-trial procedure (Rule 16), but out of thin air the matter was inserted in the Pre-Trial Order and in the Findings of Fact (Tr. 116), without any ruling by the trial

court. Actually, the Court's decision was not upon that theory at all.[8]

The fact is, that the trial court never took the arbitrary stand that the filing of the first Complaint constituted an irrevocable election. The fact is, the Government voluntarily receded from its position that it was entitled at a later time, to change its election, and went to trial under a theory that would have, had it been supported by reasonable evidence, entitled it to some three hundred thousand odd dollars in damages, and after gambling and losing, the Government, for the first time, on appeal seeks to inject a new theory into the case.

Hecht v. Alfaro, 10 Fed. 2d 464; *Union Wire Rope Corp. v. A.T. & S.F. Rwy.,* 66 Fed. 2d 905; *N.Y. & T. Land Co. v. Gulf W.T. & P.R. Co.,* 100 Fed. 830, 41 C.C.A. 87; Moore's Federal Practice, Second Ed., Vol. 5, p. 1903.

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[8] In summarizing its views in respect to the Judgment, the Court stated at the conclusion of the trial:

"Now, I have come to the conclusion in this case that the acts were the acts in connection with these applications.

"I gave some thought or consideration to maybe the transactions occurring on separate days might be a separate act, but it seems to me the genesis of the whole matter are these applications, so there were three separate applications, filed by each veteran, and then one veteran filed an additional application.

"I think that the recovery by the government should be limited to the four acts of the statutory amount, and it is my view that Mr. Hougham, I have already indicated, participated in those various acts.

"So the Court will order judgment in accordance with the views here expressed, and direct the government to prepare findings, conclusions, consistent with the remarks that I have made." Tr. 445.

POINT 5: BY PROCEEDING TO JUDGMENT ON THE SECOND AMENDED COMPLAINT, THE GOVERNMENT WAIVED ANY FURTHER RIGHT TO CHANGE ITS FORM OF REMEDY.

If the filing of the action did not constitute an election, the Plaintiff waived the right to change the form of action by filing the Second Amended Complaint and proceeding to judgment thereon.

4 C.J.S. 622 states:

> "The subsequent amendment of a pleading usually waives the right to appeal from a judgment or order sustaining a demurrer to a former pleading, or from a ruling on a motion to strike or make more specific . . ."

And 4 C.J.S. 625 states:

> "The right to appeal or bring error from an interlocutory order or decree will be regarded as waived where the party having such right voluntarily proceeds with, or participates in, subsequent steps in the trial, if this is inconsistent with the appeal or proceeding in error."

POINT 6: BY ACCEPTING THE NOTES AND THEIR PAYMENT, THE GOVERNMENT HAS BEEN AWARDED FULL RELIEF IN THE FORM PRESCRIBED BY THE STATUTE.

The Government suggests that Respondents claim that the point has become "moot". In a sense this is true, but our claim is broader than that. Our claim is that the Government has demanded and received the full award which the Court found it entitled to under the evidence. The case of *Embry v. Palmer*, 107 U.S. 3, and *Erwin v. Lowry*, 7 How. 172, and the

other cases mentioned on page 19 of the Government's Brief, are not in point, and do not bring the Government within the exception to the general rule that a party who accepts the benefit of a decree is estopped from contesting it. The exception under which it seeks refuge relates to a decree that is divisible and that part which is not contested is accepted. In the instant case, the entire decree was contested by both parties. No part of it was unchallenged. The notes were accepted and paid before the judgment became final. Here we have a situation where the Government has accepted the relief to which the Court found it entitled under Section 26(b)(1) of the Surplus Property Act which limits the Government's recovery to damages under one of the three sections. As the decree stated, the reason for the words "at the election of the Government" is to show the non-cumulative nature of the provisos.

By accepting $2,000 per act, the Government is precluded from seeking relief under a different measure of damage.

As stated in *McMahan v. McMahon*, 122 S.C. 336 at 342, 115 S.E. 293 at 295:

> "when a certain state of facts under the law entitles a party to alternative remedies, both founded upon the identical state of facts, these remedies are not considered inconsistent remedies, though they may not be able to 'stand together': the enforcement of the one remedy being a satisfaction of the party's claim."
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> Moore, Second Ed., Vol. 7, p. 3127.

POINT 7: THE RECORD OF THE PROCEEDINGS BEFORE THE TRIAL COURT WOULD NOT UNDER ANY CIRCUMSTANCES JUSTIFY THE SUPREME COURT IN REMANDING THE DISTRICT COURT DECISION WITH INSTRUCTIONS TO ENTER JUDGMENT FOR DAMAGES UNDER SECTION 26(b)(2) OF THE SURPLUS PROPERTY ACT.

Section 26(b)(2) provides that the recovery shall be a sum equal to twice the consideration agreed to be given by such person to the United States or to any Government agency. As hereinbefore pointed out by Respondents, the record contains no evidence or other proof of any agreement on the part of any of the Defendants to pay money to the Government. There were no executory contracts of any sort or nature involved in any of the complained of transactions. All of the transactions involved the cash purchase of equipment offered for sale by the Government at a fixed price. The reason why Government voluntarily withdrew its motion to file the first amended complaint (which prayed for damages under the provisions of Section 26(b)(2)) was because it appeared that the evidence developed by the interrogatories would not support a recovery of twice the consideration *agreed* to be paid because all of the transactions involved cash sales at a price fixed by the Government. Hence if this Court, for any reason or under any theory, should reverse the trial Court it cannot remand the decision to the District Court with instructions to enter judgment for damages as requested by the Government in its brief because of lack of evidence to support such a judgment. Also, as has been hereinbefore pointed out to this Honorable Court, the Government, by withdrawing its motion to file its pro-

posed First Amended Complaint and proceeding to trial, and judgment, on the Second Amended Complaint, which it elected to file in lieu of the proposed First Amended Complaint, caused the Defendants to waive a jury and to otherwise adopt trial tactics to conform with the relief prayed for by the Government in its Second Amended Complaint. Hence, even if there should be evidence in the record to support a judgment under Section 26(b)(2) [which there is not] it would be highly inequitable to remand the decision to the District Court with any instructions other than for a new trial on the voluntarily withdrawn proposed First Amended Complaint (and such a ruling by this Court would not be supported by the record of the trial court, for the District Court was not called upon to rule upon the withdrawn motion to file the proposed First Amended Complaint).

CONCLUSION

The Surplus Property Act of 1944 as amended does not afford the Government alternative remedies, but different remedies to be used when supported by proper evidence and appropriate to the occasion. While the Government in the first instance has the right to make an election of which of the different forms of remedy is appropriate, its right is not absolute and is subject to the supervision of the Court to the extent that it be reasonable and appropriate to the occasion. The second alternative of Section 26 of the Surplus Property Act is not appropriate to the

facts of this case or reasonable in the light of the circumstances and transactions here involved, and the conclusion of the trial court to this effect is not clearly erroneous, is supported by substantial evidence, and should be affirmed. Furthermore, the Government, by voluntarily withdrawing its motion to file its proposed First Amended Complaint coupled with a motion to file its Second Amended Complaint, which was granted, and by thereafter proceeding to judgment on the Second Amended Complaint without attempting to make a further election, waived any right it may otherwise have had to make a further election of the alternate remedies provided for in Section 26 of the Surplus Property Act.

Respectfully submitted,

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